

Chicago Daily Law Bulletin®

Volume 160, No. 111

Appropriation art raises intellectual property challenges in Asia

The unseasonably heavy rains did not dampen the fervor of the invitees, myself included, to the opening of Bonham's new gallery space in Hong Kong this May. Well-dressed, primarily Asian connoisseurs sipped champagne and ate canapés amid one of the most interesting arrays of modern Asian art I have ever seen.

The viewing was in anticipation of a public auction that would feature vintage liquor from the 19th century, Chinese bronzes and a selection of modern art that was as eclectic as it was clearly purely Asian.

A green and yellow image of an elegant young woman in a Vietnamese ao dai shares wall space with roly-poly Mao bronzes by Zhu Wei that looked like overgrown Matryoshka dolls. Subjects and styles included the nostalgic, the political and the outright curious. Images of Mao in various incarnations were clearly on display, but so were impressionist landscapes, found art canvases and multi-media images that explored the meaning of modern Asian identities. The artists were as diverse as their images, from Myanmar, Indonesia, Malaysia, Singapore, Vietnam, China and the Philippines.

Asian art has become big business. In the 1990s, Japanese businessmen purchased largely the finest Western art, often at inflated prices. Chinese buyers are following in their footsteps. Just last month, Jeff Koons' "Jim Beam — JB Train" sold to a Chinese buyer for \$18.3 million, more than its last reported sale 10 years ago.

Works by Asian artists have also seen phenomenal surges in value. A contemporary interpretation of Leonardo da Vinci's "The Last Supper" by Zeng Fanzhi's sold for \$23.3 million (U.S.) in October 2013. This jump in the size and number of art transactions has, almost on cue, caused a proportional increase in

intellectual property concerns.

Mixed media, particularly works using iconic images, often referred to as "appropriation art," has similarly gained in popularity. Xue's work "Who He Is" is a combination of a charred photograph of the iconic worker Lei Feng, atop an assembly of well-known images from the Cultural Revolution, appropriately tinted red. At the bottom, animé images of elves and warriors bring the issue of Asian warranty into the digital world.

Many Asian countries, including China, protect these types of photographic images for a 50-year term. (Article 21). Their copyright laws generally date from the 1980s. However, the leading copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works, requires retroactive protection. (Article 18).

Thus, mixed media, including video installations, using iconic images can flourish without having to deal with the difficult issues of fair use that artists face in the United States. Domestic copyright laws here in the U.S. impose the same life-of-the-author-plus-70 term of protection for all works.

As in other cultures, appropriation art allows for a wide range of political commentary. The overlay of Asian history and culture into the mix adds a layer of complexity that makes this market much more challenging than most.

One of the most interesting works at Bonham's was a resin sculpture by Zhou Tiehai of what appears to be the iconic Joe Camel mark in drag. Sitting on a chair, dressed in a flowered print dress, wearing shades and an attitude, the sculpture provoked smiles from the younger visitors. Titled "Art for the Masses," there is no apparent reference to Camel cigarettes.

In fact, the cigarette that appeared in the sculpture's hand in the photo in the catalogue for the exhibit has been replaced by a crystal bauble. Yet even

GLOBAL IP



**DORIS
ESTELLE
LONG**

Doris Estelle Long is a law professor, director of the Center for Intellectual Property Law, and chairwoman of the intellectual property, information technology and privacy group at The John Marshall Law School. She has served as a consultant on IPR issues for diverse U.S. and foreign government agencies, including as attorney adviser in the Office of Legislative and International Affairs of the USPTO. She can be reached at 7long@jmls.edu.

without the cigarette, determining the boundary between acceptable fair use and tarnishment of Joe Camel's masculine image internationally is unpredictable.

Under U.S. law, the use of Joe Camel, even in a dress, is unlikely to be preventable under copyright law. Fair use would undoubtedly protect such reinterpretation of this well-known image. Even the potentially more fruitful claim of tarnishment, under either federal or state trademark doctrines, would undoubtedly fail under a variety of non-commercial speech exceptions.

Internationally, however, "free speech" limitations are not always so vibrant. The newly effective 2014 Chinese trademark law, like most others, limits fair use to the generic or descriptive use of another's mark. (Article 59).

Since the Joe Camel sculpture is sold as a limited, numbered edition, it might qualify as a commercial object subject to trademark regulation. Lack of strong dilution protection in most countries should help Tiehai's camel survive any IP-based challenge.

However, China's newly estab-

lished prohibition against uses that "otherwise causes prejudice to another's exclusive right" could provide a basis for a tarnishment claim whose success could depend on the cultural sensitivities of the Chinese market.

Fair-use protection under copyright in China is similarly uncertain. As opposed to the U.S. balancing test, Asian countries rely on enumerated categories of acceptable uses in other countries. Not all countries include the types of parody represented by Tiehai's sculpture. China's enumerated list does not include either commentary or criticism. (Article 22). Hong Kong's laws only allow for "incidental inclusion in an artistic work." (Article 40). Neither guarantees Tiehai protection.

Even where art does not raise issues about potential intellectual property violations, determining chain of title, "provenance," may be more complicated with Asian Art. The shanzhai economy has spread to the art market.

"Shanzhai" refers to the Chinese counterculture that celebrates "fake" goods. This counterculture places even greater stress on authentication measures. Prior publication of works in catalogues of reputable galleries has become the new standard for guiding authenticity efforts in Asia. Such publication provides an invaluable measuring tool against shanzhai copies.

Tracing provenance may be easier for contemporary art since many pieces are owned by galleries or private collectors, who secured the works directly from the artist. However, the growing practice of flipping Asian contemporary art will rapidly complicate future chains of titles.

When dealing with the newly emerging art of Asia, one would do well to remember a well-known quote by Confucius: "The cautious seldom err."